Supreme Court, U.S.
FILED
FEB 10 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-695

In The
Supreme Court of the United States
October Term, 1987

DOROTHY LOUISE TURNER, Executrix
of the Estate of O. L. Turner,

Petitioner,

v.

CITY OF ATLANTA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

RESPONDENT'S BRIEF IN OPPOSITION

MARVA JONES BROOKS
City Attorney of
Atlanta, Georgia

BY: DAVID D. BLUM*
Assistant City Attorney
ROBERT L. ZOECKLER
Associate City Attorney
1100 South Tower
One CNN Center
Atlanta, GA 30303-2705
404/658-1150

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
REASONS WHY THE PETITION SHOULD BE DENIED	5
1. THE "TAKING" ISSUE	5
A. THIS COURT LACKS JURISDICTION	5
B. IT IS SETTLED LAW THAT NO "TAKING" OCCURS UNDER THESE FACTS	7
2. THE "NOTICE" ISSUE	11
CONCLUSION	15

TABLE OF AUTHORITIES

Page

CASES:

Agins v. City of Tiburon, 447 U.S. 255 (1980) 9

City of Eastlake v. Forest City Enterprises, 426 U.S. 668 (1976) 8

Euclid v. Amber Realty Co., 272 U.S. 365 (1926) ... 8

First English Evangelical Lutheran Church v. Los Angeles County, 107 S.Ct. 2378 (1987) ... 11

Jones v. City of Atlanta, 363 S.E.2d 254 (1988) 7

Keystone Bituminous Coal v. DeBenedictis, 107 S.Ct. 1232 (1987) 11

MacDonald, Sommer & Frates v. Yolo County, 106 S.Ct. 2561 (1986) 7

Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983) 13

Moore v. Maloney, 253 Ga. 504, 321 S.E.2d 335 (1984) 10

Mullane v. Central Hanover Bank, 339 U.S. 306 (1950) 12

Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978) 8

San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1981) 9

Turner v. City of Atlanta, 257 Ga. 306, 357 S.E.2d 802 (1987) 5, 6

Webb v. Webb, 451 U.S. 493 (1981) 6

Wilson v. City of Snellville, 256 Ga. 734, 352 S.E.2d 759 (1987) 13

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITY:

Georgia Constitution
Article 1, Section 3, Paragraph 1 6

1 RATHKOPF, LAW OF ZONING AND PLANNING 10-32 (4th ed. 1987) 13

28 U.S.C. § 1257(3) 5

United States Constitution

Fifth Amendment 5, 7, 8, 9

Fourteenth Amendment 5, 12, 13, 14

No. 87-695

In The

Supreme Court of the United States

October Term, 1987

DOROTHY LOUISE TURNER, Executrix
of the Estate of O. L. Turner,

Petitioner,

v.

CITY OF ATLANTA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Due to the large number of unsupported comments and errors in Petitioner's Statement of the Case (Petition, 3), Respondent offers the following factual summary.

Petitioner is the widow of former property owner Mr. O. L. Turner, who died during the pendency of this appeal. O. L. Turner was alive and traveling out of state at the time this case was tried. (T.3). He chose not to testi-

fy, although the trial court, with the consent of the City, authorized submission of subsequent deposition testimony if Plaintiff desired. (T.101,102). No subsequent deposition testimony was taken. His son, Mr. D. L. Turner, testified. Accordingly, the references in the Petition to "Turner" are to the owner's son, not to the actual owner of the property in issue. D. L. Turner has no property interest in this land; his only connection is "manager." (T.40).

Petitioner's property was improved with a 19 room motel when Mr. O. L. Turner purchased it in 1962. O. L. Turner expanded the motel to 29 rooms in 1975. (T.40). Adequate space existed for further expansion at that time. (T.50). During this period, the property was zoned C-1 and C-2, commercial designations. (T.82). The property continues to be used as a motel. (T.45). On 1 April 1985, during the pendency of this lawsuit at the trial level, O. L. Turner voluntarily entered into a 20-year lease for the hotel's operation by the current lessee. (T.45). The lease expires in the year 2005. (T.53). No expansion plans for the hotel exist. (T.51).

In the mid-1970's, the City of Atlanta began planning for the adoption of a new comprehensive zoning ordinance affecting the entire City and replacing the existing comprehensive zoning ordinance, known as the "1954 ordinance." (T.76). Virtually every parcel of property in the City was affected in some way by the new ordinance (T.70), some one-hundred twenty thousand (120,000) parcels. (T.95). Approximately 20,000 to 30,000 parcels were substantially changed from one zoning category to another. (T.70). Some of these changes were to "less restrictive"

zoning classifications, such as residential to commercial; others, such as the tract in issue, were to "more restrictive" zoning classifications, such as commercial to residential. This latter group constituted about 5%—or roughly 1000 to 1500—of the re-designated parcels.

Individual mailed notice to every property owner in the City of Atlanta affected by this new ordinance was not attempted by the City. It was determined that such individual notice, assuming it were possible, would be an enormous, hugely burdensome task which was not required by local ordinance or state law, nor best suited to a comprehensive change of this sort. Instead, the City embarked on a massive, multi-faceted information dissemination campaign employing every aspect of the public media.

As one part of this process, a long series of public hearings were held to inform the public of the ordinance. (T.77). Formal public hearings were held in 1979 and 1980 by the Zoning Review Board (ZRB), the public hearing zoning board for the City of Atlanta. The ZRB held a series of seven public hearings which were advertised, *inter alia,* in both the Fulton and DeKalb County newspapers. (Atlanta lies within these two counties). Proposed texts, maps, plans, and planning personnel were all available to assist the public and explain the changes and process. (T.77,85).

In addition to the formal ZRB hearings, numerous hearings were also held throughout the City of Atlanta's Neighborhood Planning Unit (NPU) system. Atlanta is carved into 24 NPU's. The NPU system is one of the City's institutionalized means of informing the public and receiving input on land use issues. Each NPU is organized

by a committee system and holds public meetings at least monthly. Every resident or property owner in the City is eligible by ordinance to be a member of their respective NPU. The City notified each NPU of the proposed changes, and individual mailings advertising NPU hearings on the proposed comprehensive ordinance were mailed by every NPU to every member of that NPU. Each NPU held public hearings at which all proposed maps, texts, and plans were made available for public review and explained by the City's professional planners. (T.79-83).

Further, announcements notifying the public of the new zoning ordinance were made through the news media, including television, radio, and newspaper advertisements and public announcements. (T.77,85). The City's goal was to put the entire Atlanta area on notice that a new comprehensive zoning ordinance affecting all parcels of land was to be enacted. There was no evidence at trial that O. L. Turner did not receive, through one or more of these notice procedures, actual notice of the City's proposed comprehensive zoning ordinance. (T.49).

On 15 December 1980, the Atlanta City Council adopted this new zoning ordinance. (T.77). It contained a one-year enactment delay, becoming effective 1 January 1982, and is known as the 1982 Zoning Ordinance. This is the zoning ordinance which now governs the zoning of all property in the City of Atlanta.

The 1982 Zoning Ordinance "downzoned" the parcel at issue herein from C-1 and C-2 (Commercial) to O-I (Office-Institutional). Under that ordinance, as amended, Petitioner's motel is fully conforming and permissible as zoned. In March, 1984, O. L. Turner applied to the City

of Atlanta to rezone his property from O-I to C-1 (Commercial). The record of the proceedings before the City shows that he sought this rezoning so that any condemnation action of his property would require payment of commercial, rather than O-I, prices.[1] O. L. Turner's son testified that there was no intent to change the use of the property at all (T.51,55) or use it for commercial purposes. The City Council denied O. L. Turner's application for rezoning on 1 June 1984. The trial court upheld that decision, which was in turn affirmed by the Georgia Supreme Court in *Turner v. City of Atlanta*, 257 Ga. 306, 357 S.E.2d 802 (1987). This petition followed.

REASONS WHY THE PETITION SHOULD BE DENIED

1. THE "TAKING" ISSUE

A. This Court Lacks Jurisdiction

Petitioner claims jurisdiction under 28 U.S.C. § 1257 (3), arguing that the enactment of the City of Atlanta's 1982 Comprehensive Zoning Ordinance is repugnant to the "taking" clause of the Fifth Amendment of the Constitution of the United States as applied to states through the Fourteenth Amendment. Petitioner identifies Appendix D, pp. A20-A22 of her Petition—the Complaint—as that portion of the record in which the federal taking claim

---

[1] O. L. Turner's son testified that he believed that a nearby school was planning to condemn the hotel. No such condemnation ever occurred, and no other evidence of this belief was produced.

was raised in the state court system (Petition 6). That Complaint nowhere references the Fifth Amendment to the United States Constitution. The remainder of the record is also silent as to this specific federal constitutional claim, as is the published opinion of the Georgia Supreme Court. *Turner v. City of Atlanta, supra.* It is well-settled that this Court's jurisdiction to reexamine a state court's final judgment by writ of certiorari can arise only if the record as a whole shows that the federal claim was adequately presented in the state system. *Webb v. Webb*, 451 U.S. 493, 496 (1981). Since the federal taking issue was not properly raised or presented in the Georgia courts, this Court lacks jurisdiction.

This Petition is more deficient than the Petition in *Webb* because the Georgia Constitution contains a taking clause: "Except as otherwise provided in this paragraph, private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid." Ga. CONST. art. 1, § 3, ¶ 1. To the extent that Petitioner's Complaint and the record reference an alleged unlawful confiscation of property rights without "prior payment of just compensation," such references are clearly to the state constitutional clause, since the "prior payment" language is unique to the Georgia Constitution.

The Georgia Supreme Court opinion reinforces this position. That Court has traditionally used the word "taking" as a term of art to describe that which occurs when a zoning regulation causes "significant detriment" to the owner which is "insubstantially related to public health, safety, and welfare." *See, e.g., Jones v. City of At-*

lanta, 363 S.E.2d 254 (1988). This is an analysis under the Georgia Constitution and bears little or nothing in common with that kind of analysis used to determine whether a land use regulation "goes so far" as to violate the Fifth Amendment. Factors used to analyze a federal taking claim, such as economic impact of the regulation, interference with reasonable investment-backed expectations, and the character of the governmental action, *see, MacDonald, Sommer & Frates v. Yolo County,* 106 S.Ct. 2561, 2566 (1986), are conspicuously absent from this record because they were never considered. This case was at all times viewed by the Georgia courts—and all litigants—as a zoning case under the Georgia Constitution. The failure of the Georgia court system to consider any federal constitutional taking issues means as a policy and jurisdictional matter that this Court should not undertake a review of that question.

B. It is Settled Law That No Taking Occurs Under These Facts

Assuming there is a sufficient record upon which to properly analyze a federal constitutional taking claim, this Petition raises no issues relating to a Fifth Amendment "taking" in the zoning context which have not already been conclusively ruled upon by this Honorable Court. The Petition should be denied since none of the Supreme Court Rule 17 considerations are presented.

Recognizing this dilemma, Petitioner seeks to distinguish this case from the "usual zoning case" by calling this a "down-zoning", the "reverse" of the usual zoning case. (Petition, 9). This distinction is superficial and constitutionally meaningless.

A municipality indisputably has the power to zone. *Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926). The power to zone is by definition the power to classify, to draw lines and assign use restrictions. Zoning, by its nature, "interferes significantly with owners' uses of property." *City of Eastlake v. Forest City Enterprises*, 426 U.S. 668, 674 n.8 (1976). That interference, in turn, nearly always affects value. Hence, mere diminution in value is never enough to invoke constitutional inquiry; it requires, at a minimum, arbitrary and unreasonable governmental behavior. It is settled law that only unjustified zoning actions are potentially compensable. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 125 (1978).

If a city can zone, it can upzone, downzone, and utilize other zoning tools, because the power to do all of this derives from the power to zone itself. The density or type of classification—in either direction—is not alone constitutionally significant. Changes in boundaries—up, down, or otherwise—are facially permissible; they are all local land-use decisions sharing identical policy questions and sources of power. It is the lack of a relation between any zoning action and the public welfare which creates the potential to run afoul of the Fifth Amendment. Petitioner incorrectly asserts the mere enactment of a downzoning ordinance constitutes a taking under federal law.

This Court's earliest zoning decision established this point. *Euclid v. Ambler Realty Co., supra*, like the case at bar, involved adoption of a comprehensive zoning ordinance. The ordinance greatly restricted previously unrestricted properties; it effectively downzoned those properties from previous expectations of unlimited development

rights. The decision, of course, holds that absent clearly arbitrary or unreasonable provisions which have no substantial relation to public welfare, zoning—more restrictive or less restrictive—is a valid police power exercise.

Agins v. City of Tiburon, 447 U.S. 255 (1980) was also a downzoning case, and parallels the Petition *sub judice*. Tiburon downzoned property, restricting its development to five houses on five acres of land previously zoned for higher density development. This Court held that the downzoning ordinance alone did not constitute a Fifth Amendment taking.[2] *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981) was also a downzoning. This Court held that further proceedings were necessary to decide whether a taking had occurred at all. The unresolved facts had to do with the uses to which the property could be put as zoned. *San Diego*, like *Agins*, teaches that the mere act of downzoning does not itself constitute a Fifth Amendment taking; the question is whether the specific ordinance is justified, and what use the property can support as zoned.

Petitioner apparently does not contend, apart from the issue of facial validity of the ordinances, that the Atlanta City Council's actions in adopting the 1982 Zoning Ordinance were unreasonable. If she does, the facts in-

---

[2] Petitioner seeks to distinguish *Agins* on the grounds that it involved vacant land, while the property in issue is developed. (Petition, 10). That argument is disingenuous: the only portion of Petitioner's property subjected to future hotel development potential is the remaining vacant space on the lot. Atlanta has not destroyed an ongoing business operation, but has curtailed only the construction of more hotel rooms on the vacant portions of the lot.

disputably show otherwise, even assuming quibbles over facts can ever authorize certiorari review. The City of Atlanta downzoned this property not as an isolated, malicious act, but as part of a new comprehensive zoning ordinance. This particular parcel was downzoned so that it would conform to the surrounding, well-established office-institutional corridor of which it is a part.[3] More importantly, there is no question here about what use can be made of the property, whether that use is profitable, or even whether Petitioner desires that use. Petitioner believes the existing use is so profitable and so reasonable she obligated herself to that use until the year 2005, and did so while this litigation was pending. She has no right to use or possession of this property before that date, and the lessee is not a party to this litigation. There are no plans for a different commercial use. The hotel use exists, is profitable, and is time-honored.

Given these facts, it is difficult to understand what it is Atlanta has "taken" from this Petitioner. At most, the City has restricted expansion of the hotel beyond thirty (30) rooms to the remaining portion of the lot now vacant

---

[3] Petitioner incorrectly states that the Georgia Supreme Court refused to consider whether the existing zoning is related to public concerns. (Petition, 10). In addition to the explicit trial court finding (Appendix C to Petition at A13, A14) based on a mountain of evidence (T.75-T.90) affirmed by the Supreme Court, the Supreme Court opinion specifically states that the existing zoning comports with the City's comprehensive development plan, the long range land use plan governing land use planning in Atlanta. The Court correctly cites *Moore v. Maloney*, 253 Ga. 504, 321 S.E.2d 335 (1984) as highlighting the importance of that compliance as well as the connection to valid public welfare issues.

after possession is reobtained in 2005. But this too is an issue resolved. *Keystone Bituminous Coal v. DeBenedictis*, 107 S.Ct. 1232 (1987) dispelled the notion that separate segments of property can be separately analyzed for taking purposes. And Petitioner's pleas notwithstanding, *First English Evangelical Lutheran Church v. Los Angeles County*, 107 S.Ct. 2378 (1987) provides her no support whatsoever. *First English* presumed a full taking had occurred. It dealt solely with the remedy available assuming a taking exists. The Petition at bar of necessity asks—or should ask—whether a taking has occurred. The remedy for a temporary, assumed take is not the question in this case. Petitioner puts the cart before the horse in arguing otherwise.

There has been no "taking" under the Federal Constitution under these facts. The cited cases answer all taking issues even remotely raised in this Petition. There being no important, unresolved federal questions necessitating review, this Petition should be denied.

2. THE "NOTICE" ISSUE

Two preliminary factual points must be made. First, it is inaccurate to state that the City failed to provide Petitioner with "any notice", (Petition, 12) and did not provide "notice by publication." (Petition, 13). Notice of the new zoning ordinance was published extensively. (*Supra*, 3-4). Second, Petitioner failed to prove at trial that owner O. L. Turner did not receive actual notice of the enactment of the 1982 Atlanta Zoning Ordinance. This case will always labor under that evidentiary flaw because O. L. Turner is now deceased. Failure to prove the absence of actual notice is fatal to this Petition. This Court

may not assume O. L. Turner had no notice in order to reach the constitutional question.

Viewed in perspective, this Petition raises no procedural due process issues requiring this Honorable Court's review. Petitioner focuses on the upzoning/downzoning "distinction" (discussed *supra*) and the isolated events of O. L. Turner's property in an attempt to mask the magnitude of the enormous procedural due process task which faced the City of Atlanta in enacting its 1982 Zoning Ordinance. The question, however, is whether the notice was "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections . . . . with due regard for the practicalities and peculiarities of the case. . . ." *Mullane v. Central Hanover Bank,* 339 U.S. 306, 314 (1950). Accordingly, the notice issue must be comprehensively viewed. When it is, it can be seen that the notice provided satisfied the Fourteenth Amendment.

Atlanta is not a small city, and virtually every parcel of real estate—some 120,000 pieces—was in some way affected by the 1982 Zoning Ordinance. (T.70). About 20,000 through 30,000 parcels changed zoning classifications. (T.70). Five percent, representing 1,000 to 1,500 parcels, were placed in "more restrictive" classifications: "downzoned." Petitioner observes only this 5% downzoned figure and concludes that individual notice for that figure was manageable. The argument is myopic in the extreme.

First, this "5% approach" assumes that only downzoned property owners are entitled to notice. This assumption is wrong. Upzoning property frequently restricts uses

in equally damaging ways. And if the owner is entitled to notice, so are nearby, affected residents. The numbers of persons due notice mushroom exponentially.

Second, even assuming only 5% are due notice, the sole way to identify that 5% would have been to compare each parcel in the new ordinance to each parcel in the old ordinance. That is a direct comparison of 120,000 parcels of land. (T.95). One can gather an understanding of the enormity of that task by noting that mailing out notices to owners and neighbors when everyone is already identified requires about one-half day of processing per parcel. (T.72).

Petitioner's constitutional claim, taken to its logical conclusion, would have essentially required the City to identify and notify by mail each owner of every parcel of land in Atlanta. This is not even arguably required by the Fourteenth Amendment. It is certainly not required by *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983), which involved, in a dissimilar context, notice to mortgagees in tax sales where the name and address of the mortgagees, who stood to lose total interest in the mortgaged property, were easily discernable and small in number.

The Georgia Supreme Court properly placed this case in perspective, as it has done in previous similar cases. *See, e.g., Wilson v. City of Snellville*, 256 Ga. 734, 352 S.E.2d 759 (1987). The decision below is fully consistent with and indeed mandated by both the teaching of *Mullane* and common sense. It is in accord with all leading zoning authorities. *See, e.g.*, 1 RATHKOPF, LAW OF ZONING AND PLANNING 10-32 (4th ed. 1987). Atlanta's multi-

faceted public notice approach (outlined *supra* at 3-5) was reasonably calculated to put all of the metro Atlanta area on notice that every parcel in the City was going to be affected by a new comprehensive zoning ordinance and provide a meaningful opportunity to be heard. Respondent submits this approach was the very best way to adequately inform the hundreds of thousands of affected persons. The Fourteenth Amendment, under existing law, requires no more.

———o———

CONCLUSION

There is no doubt that recent decisions by this Honorable Court have illuminated new issues and questions, and to some degree created uncertainty and speculation, over municipal zoning powers. It is equally without doubt that this Petition raises none of these issues. There are serious jurisdictional and evidentiary holes in Petitioner's case. Even if there were not, the Petition dwells on issues decided in previous decisions. Respondent accordingly respectfully urges this Honorable Court to deny this Petition.

Respectfully submitted,

MARVA JONES BROOKS
City Attorney of
Atlanta, Georgia
BY: DAVID D. BLUM*
Assistant City Attorney
ROBERT L. ZOECKLER
Associate City Attorney

*Counsel of Record

1100 South Tower
One CNN Center
Atlanta, GA 30303-2705
(404) 658-1150